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In The
SUPREME COURT
Of The UNITED STATES
October Term, 1982

FOUNDATION FOR THE HANDICAPPED, et al.,

Petitioners,

v.

DEPARTMENT OF SOCIAL AND HEALTH SERVICES OF THE STATE OF WASHINGTON,

Respondent.

BRIEF IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF WASHINGTON

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I. STATEMENT OF THE CASE

A. Facts

Petitioners seek review of the Washington State Supreme Court's rejection of their claim for damages suffered as a result of their asserted denial of procedural due process and equal protection rights. Peti-

tioners contend that there was inadequate service of notice for the purposes of determining their financial responsibility for costs of care and treatment.

The petitioners in the present case are the same parties who filed a suit against the State of Washington challenging the same statute (RCW 72.33.670) in 1978. See Duffy v. Department of Social and Health Services, 90 Wn.2d 673, 585 P.2d 470 (1978). The court in Duffy held that RCW 72.33.670 was valid except as applied to the situation where the state served notice upon representatives of a legally competent resident but failed to serve the resident him/herself. In this narrow situation the court held that the resident's due process rights were violated. Thereupon the state established modified procedures by administrative regulation to rectify the situation.

The petitioners did not appeal the Duffy decision to this court to have the

statute in its entirety ruled unconstitutional. Petitioners are, however, relitigating essentially the same factual and legal issues as were involved in the Duffy case.

B. History of the case

A summary of the history of the present case appears in the Washington State Supreme Court's opinion. Foundation for the Handicapped v. Department of Social and Health Services, 97 Wn.2d 691, 648 P.2d 884 (1982); see Petition for Certiorari, Appendix A. The Superior Court for Thurston County ruled in favor of the defendant, and the Washington Supreme Court affirmed the lower court's decision. Specifically, the Washington Supreme Court held that where the state has, since 1976, made personal service of notice upon the mentally or physically handicapped (but legally competent) residents - in addition to serving notice upon person or persons acting in a representative capacity as

set forth in RCW 72.33.670 (1967) - the state has complied with due process requirements.

The court also held that between the years of 1967 to 1976, due process was denied only to those residents who were not legally incompetent and yet whose estates had been charged for their care between those years. During those years the state had served only the other persons acting in a representative capacity and not the individual residents in accordance with the specific requirements of RCW 72.33.670. The Washington Supreme Court nevertheless affirmed the trial court's denial of damages to those residents on equitable grounds of unjust enrichment.

C. Summary of petitioners' arguments

Petitioners now assert four arguments in support of their Petition for Certiorari. First, they argue that the state, by statutory definition, knew that at least some of

the mentally or physically handicapped (but legally competent) residents were incapable of responding to notice in a manner which satisfied procedural due process; secondly, they argue that identically situated residents were classified differently by the subject state statute and, as a result, their equal protection rights were violated; thirdly, they argue that the statute (RCW 72.33.670) is impermissibly vague, allowing impermissible discretion to officials in determining whether or not to collect monies from the residents - along with impermissible discretion as to the manner of service of notice to be made upon the residents; and fourthly, the petitioners argue that if RCW 72.33.670 is invalid on either due process or equal protection grounds, then the notice procedures being followed discriminate on the basis of mental handicap and thus violate the Washington Anti-Discrimination Law, RCW 49.60.030.

II. REASONS WHY THE WRIT SHOULD BE DENIED

A. The procedures upheld by the state court's decision do not violate petitioners' procedural due process rights and are not in conflict with applicable decisions of other courts.

This court in Mullane v. Central Hanover Bank and Trust Company, 339 U.S. 306 (1950) stated:

> An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.

(Emphasis added.) Id. at 313.

RCW 72.33.670 was held by the Washington Supreme Court in Duffy to be constitutionally defective with respect to notice that was served upon the representatives of a resident but not upon the resident him/herself where that resident was not established as legally incompetent. Duffy v. Department of Social and Health Services,

supra. In neither Duffy nor in Foundation for the Handicapped, however, did the court find the statute void in its entirety because of this narrow constitutional defect, an approach which is consistent with decisions of this court with respect to statutes having constitutional defects. In re Rahrer, 140 U.S. 545 (1891); Butler v. Goreley, 146 U.S. 303 (1892); Central Pacific Railroad Company v. Nevada, 162 U.S. 512 (1895).

This is also consistent with the legislative intent. On four separate occasions the legislature has amended various sections of the law, Ch. 72.33 RCW, pertaining to state residential schools where severability clauses have been included. Each of these clauses has included the words:

> If any provision of this amendatory act, or its application to any person or circumstance is held invalid, the remainder of the act, or the application of the provision to other persons or circumstances is not affected.

Washington Laws of 1973, 1st Ex. Sess., ch. 154, § 130; 1974 Ex. Sess., ch. 71, § 13; 1977 Ex. Sess., ch. 80, § 76; 1979 Ex. Sess., ch. 217, § 17.

Sutherland, Statutory Construction, similarly states:

> The courts recognize a duty to sustain an act whenever this may be done by proper construction, and extend the duty to include the obligation to uphold part of an act which is separable from other and repugnant provisions.

Sutherland, Statutory Construction § 44.01, p. 336 (4th ed. 1972).

It is clear that the Washington Supreme Court was acting within the scope of its powers and serving the ends of legislative intent by ruling the defective portion of the statute unconstitutional and leaving the remainder of the statute effective.

Petitioners now assert that by leaving the statute essentially intact, the state court's decision

> allows for the service of a printed form notice to a class of per-

> sons the state knows, by statutory definition, are incapable of understanding such notice.

(Petitioners' brief, p. 14.)

The statute to which petitioners refer in this connection is RCW 72.33.020 which, for the purpose of admission to a state residential school, defines mental and physical handicap as follows:

> As used in this chapter, unless the context requires otherwise:
>
> (1) "Mental handicap" is a state of limited development in consequence of which the individual affected is mentally incapable of assuming those responsibilities expected of the socially adequate person such as self-direction, self-support and social participation.
>
> (2) "Physical handicap" is a state of physical impairment in consequence of which the individual affected is physically incapable of assuming those responsibilities expected of the socially adequate person such as self-direction, self-support and social participation.

The Washington Court rejected petitioners' argument that these definitions

necessarily mean that a handicapped resident is incompetent for purposes of due process, saying:

> The relevant statutes unmistakably provide that residents of the state schools include physically handicapped persons. Mental incompetency is not a requisite to admission.

Foundation for the Handicapped, 648 P.2d at 889.

The Washington Court thus rejected petitioners' argument that Covey v. Town of Somers, 351 U.S. 141 (1956) was relevant because:

> The state is not put on notice that every resident is unable to comprehend a notice pursuant to the applicable definitions and statutes.

(Emphasis added.) Foundation for the Handicapped, at 889.

The petitioners now assert that:

> While the state cannot presume the incompetency of residents, in light of its own statutory definition of the population involved, it certainly cannot presume competency, as the Supreme Court of Washington allows.

(Petitioners' brief, p. 20.)

The petitioners thus argue that due process requires that any and every mentally or physically handicapped person admitted to a residential school must undergo a competency hearing. But, because "Mental incompetency is not a requisite to admission" (Foundation for the Handicapped, at 889), petitioners' asserted position would cause residents who are competent to manage their own affairs to be subject to an unnecessary competency hearing simply because they sought admission to a residential school. This would not only be demeaning to the individuals involved and unnecessarily jeopardize their civil rights, but would in addition cause an unnecessary financial drain on the resources of residents. Petitioners' argument reduces down to a presumption that the individual's civil rights as a person and a citizen are to be questioned from the point in time when they first seek

entrance into the residential school. The state subjects no other class of individuals to a similar presumption. The state has specifically forbidden this presumption by providing in RCW 71.05.450 that:

> No person shall be presumed incompetent or lose any civil rights as a consequence of receiving evaluation or treatment for mental disorder.1/

Those persons who are determined incompetent at the entrance competency hearing would lose certain civil rights as a consequence of seeking evaluation and treatment for their mental or physical handicap. Petitioners' argument would be in direct violation of the above statute designed to restrict the state's ability to interfere with the due process, as well as all other, rights of its citizens.

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[1]Washington case law also clearly supports this rule. See In re Burnett, 30 Wn.2d 160, 191 P.2d 283 (1948); In re Kenstrip v. Cranor, 39 Wn.2d 403, 235 P.2d 467 (1951); In re Varner v. Cranor, 42 Wn.2d 860, 259 P.2d 416 (1953).

B. Petitioners' equal protection rights have not been violated by this subject state statute.

The Washington Court similarly rejected petitioners' equal protection argument. In so doing, the court articulately set out the problem, saying:

> The "classification" in the present case is between Duffy-type adult residents, who are legally competent, and more severely handicapped or juvenile residents who are subject to legal incompetency. All juveniles are in the latter category. Thus, the distinction is not, as the Foundation contends, between severely handicapped and less severely handicapped persons. Rather, the distinction is between those who have been deemed legally incompetent requiring a guardian to manage their affairs and those who have not. Such a distinction in our view does not amount to a suspect classification. Therefore, the rational basis test is the proper standard of review.

Foundation for the Handicapped, 648 P.2d at 888.

Under the rational relationship test, the court then made the following analysis:

> Since juveniles and more severely handicapped adults are less likely to comprehend the personal notice required to be served upon Duffy-type residents, we find a rational basis for distinguishing between the two groups. The rights of handicapped persons subject to a legal disability are best protected by notice to a guardian or other representative. Less handicapped persons not subject to a legal disability are more apt to understand the notice and should be permitted an opportunity to respond on their own behalf as well as through their representatives. Thus, the distinction is premised on the legal competency of the individual and is rationally related to the purpose of the statute, which is to afford each resident with meaningful notice. Such a distinction does not offend the principles of equal protection.

Id. at 888.

The petitioners now assert that the Washington Court presumed that the legislature intended to classify residents based upon legal competency. The petitioners state:

> This is certainly a commendable goal. Unfortunately for the court, the Washington Legislature

> never stated, implied or intended such a classification.

(Petitioners' brief, p. 26.)

The legislature is presumed to have intended its statutes to be constitutional and "statutes should be construed to sustain their constitutionality when it is possible to do so." Sutherland, Statutory Construction § 44.01, p. 336 (4th ed. 1972), citing El Paso and Northeastern Railroad Company v. Gutierrez, 215 U.S. 87 (1909).

Here the purpose of RCW 72.33.670 was to provide for notice, service of process, hearings and appeals. These are all constitutional procedural due process requirements. The Washington Court correctly presumed that the legislature was attempting to meet due process requirements in this statute. Thus the court interpreted the statute so that these requirements were met. For the court to service the ends of the legislature, it was necessary to recognize that

due process required service of notice to be made directly upon a legally competent resident. For an incompetent resident, service must be upon the guardian or person responsible for the incompetent resident. The Washington Court properly analyzed the statute and properly reached the conclusions necessary to fulfill the statute's constitutional obligations. In doing so, we submit, the court did not step beyond the bounds of proper statutory interpretation.

C. The subject state statute is not impermissibly vague.

Petitioners' assertion that RCW 72.33.670 is impermissibly vague is based on a contention that the statute is silent as to four classes of individuals: (1) residents who have guardians; (2) residents found legally incompetent but without guardians; (3) residents declared partially disabled; and (4) residents not subject to a legal declaration of incompetency.

The petitioners assert that:

> The result is impermissible discretion allowed to state officials in determining whether to collect from and the manner of service upon those residents not mentioned in the statute.

(Petitioners' brief, p. 29.)

This court accepts as binding the statutory construction of the state's highest court, with respect to state statutes, for purposes of issues regarding vagueness. Minnesota ex rel. Pearson v. Probate Court of Ramsey County, 309 U.S. 270 (1940).

The Washington Supreme Court stated:

> Since the legislature granted general collection powers to DSHS, it must have intended that the statute be construed to permit and require personal service on all persons constitutionally entitled thereto because such service is reasonably necessary to achieve the objective of the collection program.

Foundation for the Handicapped, 648 P.2d at 889.

Because the Washington Court construed this to be the purpose of the statute, the

court stated that for procedural due process purposes the only relevant distinction is

> between those who have been deemed legally incompetent requiring a guardian to manage their affairs and those who have not.

Foundation for the Handicapped, at 888.

From the Washington Court's construction of the statute, it is perfectly clear that where the person is competent, then he/she is to be served personally; and where the person is incompetent, then the guardian should be served. Under that construction of the statute, an ordinary person exercising ordinary common sense can sufficiently understand and can comply with the statute, which satisfies the test for vagueness. United States Civil Service Commission v. National Association of Letter Carriers, 413 U.S. 548 (1973); Jordan v. DeGeorge, 341 U.S. 223, reh. denied 341 U.S. 956 (1951); Broadrick v. Oklahoma, 413 U.S. 601 (1973).

Petitioners attempt to divert this court away from the central issue of competency in order to make the statute appear vague by making distinctions among individuals not relevant to the purposes of the statute. Any resident "not subject to a legal declaration of incompetency" is competent and therefore must have personal service; the category of residents who are "partially disabled" is so broad and uninformative that it has no relevance to the purposes of the statute; to speak of residents who are legally incompetent but without guardians infers that whatever court determined their legal incompetence also failed to appoint a guardian, a peripheral issue to the purposes of the statute; and residents who have guardians are incompetent and thus the guardian should be served.

Petitioners' assertions thus fail to demonstrate vagueness.

D. The procedures upheld by the state court's decision do not violate Washington's Anti-Discrimination Law.

Petitioners' last argument is that the procedures upheld by the Washington Supreme Court violate Washington's Anti-Discrimination Law, RCW 49.60.030. This argument is facially without merit because the petitioners have failed to demonstrate that their due process or equal protection rights were violated as a result of the state's actions. In response to petitioners' argument, the Washington Supreme Court stated:

> The Foundation contends that basing the type of notice that is required on the extent of the residents' handicaps constitutes illegal discrimination. We do not agree. As noted above, the classification is based upon the presence or absence of a legal incompetency. The incompetency can be based upon age, developmental disability, or severe mental deficiency. RCW 11.88.010(1). There has been no discrimination solely "because of" a mental or physical handicap.

Foundation for the Handicapped, 648 P.2d at 888.

The Washington Court properly concluded that Washington's Anti-Discrimination Law had not been violated.

III. SUMMARY

The Petition for Certiorari should be denied. Petitioners' arguments were addressed directly and in depth by the Washington Supreme Court. The opinion below was accurate and correct as has been shown in this response. The Washington Supreme Court's decision was also fair, and it preserves the presumption that all persons, including the mentally and physically handicapped, are entitled to equal treatment under the law and to the same due process rights that apply to all persons.

DATED this 13th day of December, 1982.

Respectfully submitted,

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